IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

THE VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

vs.

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

On Appeal From a Judgment of the United States Court of Appeals for the Second Circuit

SUPPORTING PETITION ON BEHALF OF APPELLEE BY AMICUS CURIAE NEW COMMUNITIES, INC., A MINNESOTA NON-PROFIT CORPORATION

BERNARD E. GEGAN, ESQ.
50 Beacon Hill Road
Port Washington
New York, New York 11050
Attorney for Appellant

LAWRENCE G. SAGER
ARTHUR N. EISENBERG
84 Fifth Avenue
New York, New York 10011

CHESTER A. BRUVOLD, ESQ.
410 WCCO Building
Minneapolis, Minnesota 55402
Attorney for Amicus

1974—Northwest Brief Printing Co., 501 Park Ave., Minneapolis 55415 339-5078

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Support of Appellee's Position	3
Statement of Facts	3
Statement of Issues	4
General Statement	5
The Right to Contract as Recognized	6
What are "Rights" "Retained By the People"	10
The Governmental Interest Concerning the Right to Contract	13
The Governmental Interest Concerning Land Uses	16
The Nature of the Contract Involved and the Meaning of Family	17
The Impairment of Contract Issue	24
The Discriminatory Classification Issue	27
The Right of Association	32
A Governing Authority	35
Conclusion	36

TABLE OF AUTHORITIES

Cases:

Adkins v. Childrens Hospital, 261 U.S. 525 24
Advance-Rumley Thresher Co. v. Jackson, 287 U.S. 283, 72 L.Ed. 306 14
Alderman v. U.S., 374 U.S. 165 9
Allgeyer v. Louisiana, 165 U.S. 578 .....6, 30
Coppage v. Kansas, 236 U.S. 1, 59 L.Ed. 441, 35 S.Ct. 240 .....7, 24
Eisenstadt v. Baird, 405 U.S. 438 .....26, 29
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 76 L.Ed. 214, 52 S.Ct. 69 ..14, 30

Holden v. Hardy, 169 U.S. 366, 42 L.Ed. 780, 18 S.Ct. 383 ..... 7, 24
Lumberman's Mutual Casualty Co. v. Pulsifer, D.C. Me. 41 F.Supp. 249 ..... 21, 22
Nelson v. Poorman's Estate (Mo. App.) 215 S.W. 753 21
Robbins v. Bangor Ry. & Electric Co., 100 Me. 496, 1 L.R.A. N.S. 963 20
Smart v. Bissonette, 106 Conn. 447, 138 A. 365 21
Spring Valley Water Works v. San Francisco, 52 Cal. 120 21
Tomlyanovitch v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 21
United States v. Joint Traffic Association, 171 U.S. 505, 43 L.Ed. 259, 19 S.Ct. 25 15
United States v. Sisson, 294 F.Supp. 511, 399 U.S. 267 9
United States Department of Agriculture v. Moreno, — U.S. —, 37 L.Ed. 782, 93 S.Ct. 2821 ..... 16, 19
Vace v. Wyatt, 141 Iowa 506 21
West Coast Hotel v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 ..... 13, 24, 30
West Virginia State Board of Education v. Barnett, 319 U.S. 624, 87 L.Ed. 1171, 63 S.Ct. 1178 9

Constitutional Provisions:

Article I, Section 10, United States Constitution 7
Ninth Amendment 5, 7, 9, 10

Statutes:

Minnesota Business Corporation Art., Minn. Statute, Section 301.41 33

Ordinance:

Village of Belle Terre, Article I, §D-1.35a (June 8, 1970) 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

THE VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

vs.

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

On Appeal From a Judgment of the United States Court of Appeals for the Second Circuit

---

SUPPORTING PETITION ON BEHALF OF APPELLEE BY AMICUS CURIAE NEW COMMUNITIES, INC., A MINNESOTA NON-PROFIT CORPORATION

INTEREST OF AMICUS

New Communities, Inc., is a Minnesota Non-Profit Corporation organized for the specific purpose of assisting and aiding, by educational and informational means, those per-

sons who seek a more meaningful life and the greater freedom that comes from shared living experiences with compatible and concerned people. The concepts involved in the ideas categorized as "the extended family", "communal living" and "open marriage",* together with the personal growth that comes from living a sharing and cooperative life, are all matters of primary concern to the members of New Communities, Inc. Membership is composed of persons who are living in collective associations, persons who are considering doing so, persons who have marriage contracts and seek by the concepts and associating with like-minded persons in the gatherings of New Communities to better their own understandings and relationships, and other individuals who seek to better their associations and their communications with other people. Most of the members of New Communities, Inc., look upon the current concept of marriage, defined as a "husband-wife-children" categorization, as a role-casting relationship which isolates people from each other. Such defined role relationship is today being classified as the "traditional" concept of family; but historically this is not accurate because until recent times a family consisted of more people of many ages and relationships living together, not so much in categorized roles as on a group-concern for each member of the family as a person. It is the concept of the limited role-defined "family" that is all too often sought to be frozen into the laws of "bed-room communities" today. This is an attempt to impose rigid mores on society. Under the guise of zoning ordinances, certain persons, using the police power of the government, are seeking to

*A concept of marriage as an equal partnership with both spouses having the individual ability to lead their own lives and have their own occupations and associates.

impose their "moral values" upon other persons. Since members of New Communities, Inc., see such action as contrary to a live, healthy, and libertarian society, such ordinances as those in this case are a grave social concern to the members of New Communities, Inc.

The issues involved in this litigation fall within an area of concern for which this non-profit corporation was formed and thus Amicus has a special interest in this litigation and the decision of the Court.

AMICUS SUPPORTS APPELLEE'S POSITION

The concepts of the Right to Travel and Right of Privacy under the umbrella of the Constitutional guarantee of Equal Protection as heretofore enunciated by the Courts has been so well researched and argued in Appellee's brief that no attempt is made by Amicus to repeat the arguments. Amicus urges the Court to adopt the position of Appellees and affirm the soundly reasoned decision of the Second Circuit Court of Appeals as reported in 476 F.2d 806. However, this brief is submitted to the Court to establish that there are other and additional rights upon which the Court may decide the issue in favor of the Appellees, based upon direct and substantial rights.

AMICUS CURIAE POSITION

STATEMENT OF FACTS

The essential and pertinent facts of concern to Amicus and stated here for purposes of Americus brief are as follows:

1. The Village of Belle Terre adopted a zoning ordinance creating a single family residence area and defining a family as follows:

"One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."
Article I, §D-1.35a (June 8, 1970)

2. The plaintiff-appellees consist of the owner of a single family residence in the Village of Belle Terre, which has six bedrooms, rented to a group of six students, at a nearby college, which students were without blood relationship, but were organized as a single household and sharing in the duties and obligations of the single tenancy of the property, three of whom are plaintiff-appellees in this cause.

3. The Village of Belle Terre threatened to enforce the ordinance against the Plaintiff-Appellees, who then instituted this injunctive action in the Federal District Court against the Defendant-Appellants, and injunctive relief was granted in the lower courts.

4. That it is a matter of common knowledge that similar ordinances generally are a part of the zoning codes in municipalities throughout the United States; and that such ordinances, most of which were enacted in relatively recent times, are a great concern of Amicus.

For a more detailed statement of facts as relied upon by Amicus, see 476 F.2d, pages 808 to 810.

STATEMENT OF ISSUES

1. Do the six persons have a right to live together as a single household by agreement between themselves as a

Contract Right; and do they have this as a right of Association?

2. Can a governmental interest, under a zoning ordinance, be so worded and applied by a municipal government as to infringe upon these rights of contract and association without violating the constitutional rights of persons such as the plaintiff-appellees here?

3. Can there be a governmental interest in creating a distinction and discriminatory classification by number of person based upon a "blood" as contrasted to a "non-blood" relationship, and can a governmental interest support a distinction between a marriage contract and other contracts to form a common household, under the guise of a zoning ordinance, i.e., a land use ordinance?

GENERAL STATEMENT

It is the position of Amicus that there are two basic Ninth Amendment Constitutional Rights involved in this matter. The one is the Right to Contract and the other is the Right of Association. The Ninth Amendment provides as follows:

"Article IX

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Like other "rights", those under the Ninth Amendment must be considered basic powers of the individual, but they are not unlimited licenses. They are rights of responsible conduct. Like other rights, they cannot be exercised in an unlawful manner, a manner that causes destruction or obstruction to other persons, or exercised so as to deny

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."
> Article I, §D-1.35a (June 8, 1970)

2. The plaintiff-appellees consist of the owner of a single family residence in the Village of Belle Terre, which has six bedrooms, rented to a group of six students, at a nearby college, which students were without blood relationship, but were organized as a single household and sharing in the duties and obligations of the single tenancy of the property, three of whom are plaintiff-appellees in this cause.

3. The Village of Belle Terre threatened to enforce the ordinance against the Plaintiff-Appellees, who then instituted this injunctive action in the Federal District Court against the Defendant-Appellants, and injunctive relief was granted in the lower courts.

4. That it is a matter of common knowledge that similar ordinances generally are a part of the zoning codes in municipalities throughout the United States; and that such ordinances, most of which were enacted in relatively recent times, are a great concern of Amicus.

For a more detailed statement of facts as relied upon by Amicus, see 476 F.2d, pages 808 to 810.

STATEMENT OF ISSUES

1. Do the six persons have a right to live together as a single household by agreement between themselves as a

Contract Right; and do they have this as a right of Association?

2. Can a governmental interest, under a zoning ordinance, be so worded and applied by a municipal government as to infringe upon these rights of contract and association without violating the constitutional rights of persons such as the plaintiff-appellees here?

3. Can there be a governmental interest in creating a distinction and discriminatory classification by number of person based upon a "blood" as contrasted to a "non-blood" relationship, and can a governmental interest support a distinction between a marriage contract and other contracts to form a common household, under the guise of a zoning ordinance, i.e., a land use ordinance?

GENERAL STATEMENT

It is the position of Amicus that there are two basic Ninth Amendment Constitutional Rights involved in this matter. The one is the Right to Contract and the other is the Right of Association. The Ninth Amendment provides as follows:

> "Article IX
>
> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Like other "rights", those under the Ninth Amendment must be considered basic powers of the individual, but they are not unlimited licenses. They are rights of responsible conduct. Like other rights, they cannot be exercised in an unlawful manner, a manner that causes destruction or obstruction to other persons, or exercised so as to deny

the same right or some right to other persons. This is the same "governmental interest", "due process" and "equal protection" legal difficulties which make the application and generalization of Constitutional Rights the thorny problem that it is. But it is the position of Amicus that the Court should recognize and use one or both of the rights stated above as an additional basis in affirming the decision of the Second Circuit Court of Appeals in this matter.

THE RIGHT TO CONTRACT AS RECOGNIZED

Many cases have dealt with and spoken of the "right to contract"; but have treated the subject as though this was an "inferred right" from other Constitutional sources and not as a direct right "retained by the people". But the Courts have dealt with the problem in fact as though this was a primary and direct right. Thus in *Allgeyer v. Louisiana*, 165 U.S. 578 at page 589,

> "The Supreme Court of Louisiana says that the act or writing within that State, the letter of notification, was an act . . . prohibited by statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. . . . The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

As will be discussed later in this brief, page 13, et seq., many cases assume there is a right to contract and then find the statute involved to be a valid limitations upon the right by giving reasonable definition to what is societal and responsible conduct.

In considering the right to contract as a Ninth Amendment right it should be noted that even before the adoption of the Fourteenth Amendment, the framers of the Constitution in Article 1, Section 10, provided:

> "Section 10. No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver coin a tender in payment of debts; pass any Bill of Attainder, ex post facto law, or *law impairing the Obligation of Contracts,* or grant any Title of Nobility." (Italics supplied).

See also: *Coppage v. Kansas,* 236 U.S. 1, 50 L.Ed. 441, 35 S.Ct. 240, wherein the Court upheld as a "contract right" of the employer to require that an employee not join a union. Amicus counsel believes the better law is expressed in the dissenting opinion of J. Day and Hughes on page 42 as follows:

> "I therefore think that the statutes of Kansas . . . did not go beyond a legitimate exercise of the police power, when it sought not to require one man to employ another against his will, but to put limitations upon the sacrifice of rights which one man may expect from another as a condition of employment. Entertaining these views, I am constrained to dissent from the judgment in this case."

and *Holden v. Hardy,* 169 U.S. 366, 42 L.Ed. 780, 18 S.Ct. 383, wherein the Court held it within the power of the state to prescribe minimum hours in the mining industry because

of the hazard involved to the health of the laborer, note the words of the Court, on page 397.

> ". . . In other words the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself . . ."

It is Amicus position that the air should be cleared and the right to contract set out as a right unto itself (taking along with it many others, such as, to enumerate but a few, the Right of Privacy, the Right to Travel, the Right to choose one's association, the Right to Education). These are all valuable rights "retained by the people" to each individual, upon an equal footing with the Right to choose one's religion, the Right to speak, the Right to print and publish, the Right to petition the government, the right of jury trial, the Right to Counsel of one's choosing. It should be noted that these are different concepts of "rights" from those of "due process", "equal protection" and "no review other than under the rules of the common law", which are procedural matters to be assured to each individual by the judicial system. Without these procedural rights, obviously, all the others break down or disappear, thus in our common law court system, we keep returning to the procedural rights in defining the others. But this is not to say that basic substantive rights should not be recognized as primary Constitutional Rights standing on their

own as those "retained by the people" under the Ninth Amendment. Amicus urges this.

The difficulty confronting lawyers and Courts today is that these necessary concepts of liberty must be approached and argued indirectly. If the Right of Privacy were recognized as a Ninth Amendment Right would the problems of *Alderman v. U.S.*, 374 U.S. 165, and other cases dealing with eavesdropping and surveillance cause the difficulty they do? We also have the situation of the flag saluting case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1171, 63 S.Ct. 1178, wherein the Court says:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the state to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the right of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stands on a right of self-determination in matters that individual opinion and personal attitude."

There are also such cases as *U.S. v. Sisson*, 294 F.Supp. 511, 399 U.S. 267 (affirmed on other grounds) where an eminent jurist has a basic reaction to a given situation. It is Amicus position that the Court should recognize such situations and instead of looking to the procedural rights of the Fifth and Fourteenth Amendments as a basis for de-

ciding such cases, should look to the Ninth Amendment, which is as much a part of the Bill of Rights as the First and Fifth Amendments. Thus would those dealing with these problems in the law be able to deal directly with the rights and whether the limitation sought by a given regulatory statute or ordinance infringed upon them or defined responsible conduct.

WHAT ARE "RIGHTS" "RETAINED BY THE PEOPLE"?

(While this could be the subject of a lengthy treatise not consistent with the legal argument of an appellate court brief, yet Amicus counsel feels justified in making a limited explanation of the concepts going beyond the limited Right to Contract and the Right of Association, both of which are a vital concern to Amicus, which are involved in Ninth Amendment rights, with the hope that a short explanation will be of some assistance to the Court in evaluating the validity of Amicus position.)

Clearly by its terminology the Ninth Amendment was intended to cover many "rights". These, together with those others specifically mentioned in the Constitution can be generalized as the concept of "liberty". Thus, if we come to understand "liberty", we can better understand the problems. Does "liberty" exist because a government grants it, or does "liberty" exist because it has within it some inherent and almost universal human response? It is a sense and a feeling within a human being that "it" is necessary for his own personal life and interference somehow invades his own personal being. Liberty must be distinguished from license, i.e., liberty certainly is not a concept which grants to a person a power over others, or to injure or exploit others. In order to understand liberty one must first understand that this is a concept of thought and re-

lationship. This is much misunderstood because liberty does not primarily pertain to conduct, but rather to a state of mind. A man has no liberty if he thinks of himself as a slave, as a person whose thought or mind is controlled by some other person. Liberty is the process of making a decision, and particularly the decision as to the individual's relations to other members of society. Its essence is socially responsible decision-making. Of course, the individual decisions are useless if he cannot act upon them, thus we many times confuse the acts of the individual with the concept of liberty. We do judge and evaluate each other on the basis of behavior, conduct and acts, and not on the thinking process. It is because the individual's outward behavior reflects his thoughts that we all too easily overlook a basic factor—that liberty is a state of mind and not behavior. But we must also recognize that by controlling the behavior of the individual, the individual's state of mind can be controlled. But just as the concept of life can be said to be absolute and inalienable, so also can we say that liberty is absolute and inalienable. Liberty is a fact which belongs to the individual as absolutely as life itself. We must recognize that the outward manifestations of liberty, i.e., the behavior of the individual, are limited since the essence of liberty is socially responsible decision-making; thus, its manifestations in the form of individual acts cannot be such that the act or acts operate to destroy the liberty, or life, of another. It is not unrestrained activity, but concerned activity. Liberty or freedom, in a societal concept and in a legal context can only be equated with responsibility. To be responsible is to have a concern. Thus, those concepts of individual decision and individual action which a human being must have if he is to be responsible and have a concern must be defined as "liberty".

Throughout any discussion on a concept of liberty lies an underlying minor premise of restraint. A person, or a government, must *not* take affirmative action against another individual which encroaches upon that individual in some manner. It can be stated that a person acting out of a sense of responsibility must not take an action which injuries another. A person has a right to religious freedom, but he cannot act to the detriment and danger of another person. One cannot say that his religion requires human sacrifice and thus justify the taking of another's life. But what is meant by religious freedom is that neither the state nor any other person can, by force or threat, compel another to accept a concept of religion with which he does not agree.

Also, as stated previously in dealing with liberty as a bundle of rights one must recognize the distinction between a "license" and a "right". A right is something inherent to the individual human being. A license is a grant of power. Both in a sense involve the exercise of power, and both have become loosely defined as rights. Thus, a government grants a "fee" in land. This is a license to use the land, or to sell it, or the right to pass this license on to one's heirs. This license having been granted by the government is said to be "rights in land". But when one government takes power over a land area from a different government, it grants rights to this land to certain persons, and those who claim rights in this land from the prior government are no longer considered to have those rights. In this respect, and in many others, such rights in land differ from basic human rights. Similarly a government will grant a franchise to carry on an economic enterprise to certain persons. We speak of such persons as having a right to conduct such business; but this again is really a

license, a power granted by the government, and as such differs from the concept of liberty. A grant of power, a license can have many restrictions placed upon it without there being that sense of feeling that a person's very being is encroached upon. To pursue this further one must turn to the political philosophers who had a great influence upon the framers of the Constitution, such as John Locke, John Stuart Mills and others.

THE GOVERNMENTAL INTEREST CONCERNING THE RIGHT TO CONTRACT

While not entirely applicable, yet some guidelines can be obtained from the cases which have found a governmental interest involved where a claimed right to contract was asserted. These cases deal chiefly with "business" contracts. While a person has right to engage in business, yet it is well established that society has a right to regulate commerce, and thus such contracts, as a part of commerce, may be subject to closer scrutiny than strictly personal contracts as the one in the case at bar. But from these cases we can conclude that while a person has a right to contract, there are overriding societal concerns which are necessary to define socially responsible conduct. In effect such was the holding of the Court in *West Coast Hotel v. Parrish*, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, which sustained the power of state legislatures to enact minimum wage laws for women. It is interesting to note today Justice Sutherland's dissenting opinion in which he raises the question of "equal protection" because of the discrimination between men and women. However, the majority opinion discarded the concept as a side issue because it found the position of women in society to be a part of the "exceptional circumstances" which justified the limitation placed

upon the right to contract. Today we clearly recognize that the "exceptional circumstances" apply to both men and women and that the "equal protection" argument would carry much greater weight. But one must remember that this case was decided in 1936.

Most cases dealing with the right to contract involve some regulatory infringement upon the right. This, as we have seen in the discussion on "liberty" above, is logical because rights are a power to act but such action must be socially responsible, and certainly a reasonable defining of what is socially responsible is proper. Thus Minnesota adopted a statute requiring compulsory arbitration of the evaluation of damages in fire insurance policies and this was attacked as an interference with the right to contract. *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 76 L.Ed. 214, 52 S.Ct. 69, on page 157 the Court says:

> ". . . Without stopping to examine those contentions, we assume that appellant's freedom of contract was restricted by operation of the statute . . .
>
> The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community."

In another situation the State of North Dakota adopted a provision for an implied warranty of fitness for purpose as a part of a Uniform Sales Act, and this was applied by the North Dakota Court in the sale of a combine. The case is *Advance-Rumley Thresher Co. v. Jackson*, 287 U.S. 283, 77 L.Ed. 306. On page 288 the Court says:

> "The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraint as the State in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U.S. 525, 545, 546, and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has the benefit of performance of the other party to a contract will be permitted to avoid his own promise . . .

Then on the next page the Court recites at length the circumstances which justified the limitation upon the right to contract; the language of which in effect says that socially responsible conduct in the circumstances of the case made the statute an acceptable limitation upon the right to contract. There is also the whole field of anti-trust cases in which the right to contract had been raised and the Courts have found that as a reasonable definition of a limitation upon the right, such legislative acts were valid. See: *U.S. v. Joint Traffic Association,* 171 U.S. 505, 43 L.Ed. 259, 19 S.Ct. 25, and many subsequent cases. If one considers these cases on the theory that liberty is a concept of social responsibility with "rights" being the power to carry out that responsibility, then the anti-trust laws are definitions of what is socially responsible in a reason-

able manner. This is a position which fits the whole field of anti-trust legislation into the concepts of the right to contract, and does so in a direct manner without the need of reference to the procedural rights.

In all of these situations, we are dealing with commercial contracts falling within the recognized power of the "governmental interest" in the regulation of commerce. Clearly any person who enters into a commercial contract does so with both the expectation and knowledge that the law must define social responsibility in a reasonable manner to preserve essential fair dealing between people with unequal economic power. Thus commercial contracts must be subject to a substantial governmental interest; but these cases do provide some evaluation of human rights and liberties insofar as the right to contract is concerned. However, Amicus must point out that in the case now before the Court we do not have a commercial contract, we are dealing with a very personal contract, as will be shown later, so there is a basic distinction, which has a similarity to the problem which the Court faced in dealing with a restrictive governmental regulation in *United States Dept. of Agriculture v. Moreno*, — U.S. —, 37 L.Ed.2d 782, 93 S.Ct. 2821.

THE GOVERNMENTAL INTEREST CONCERNING LAND USES

As has been argued the "right to use land" is in reality a license granted by government and readily subject to a substantial governmental interest. However, there must of necessity be the concept of "rights" which protect the individual in his use of land; otherwise, all his other "rights" can be rendered meaningless. Thus, the "right to use land" is not a license in the same sense as a license to engage in a commercial enterprise that creates an imminent danger.

The latter must be subject to extreme scrutiny and readily revocable. Thus the right to use land is a protected right and a favored right and one not subject to easy revocability. But the right to use land has been reasonably limited by the concepts of building and zoning laws. This is proper provided that such laws do not involve "arbitrary restraint" and amount to no more than "reasonable regulation".

It is Amicus' position that permissible and impermissible regulation and restraint have been dealt with so comprehensive and accurately in Appellee's Brief, pages 9 and 10, and 34 to 42, that a recitation here would only be duplicitous.

THE NATURE OF THE CONTRACT INVOLVED AND THE MEANING OF FAMILY

On the bottom of page 813 and top of page 814 (476 F.2d) the Circuit Court of Appeals in this case says:

> "Unquestionably the rights claimed by appellants (plaintiff appellee's now) are important. Certainly they are more personal and basic in nature than those of commercial interests of the type under consideration in Lindsley, supra, and McGowan, supra . . . Nor does the present case fit snugly into any of the other categories recognized as requiring application of the compelling state interest test. Despite the incidental effects of the Belle Torre ordinance, we are not here dealing with a 'suspect' classification such as race . . . or with a law directed against a right of association sought as a means of political expression or action . . ."

on page 810 (476 F.2d) the Circuit Court of Appeals in this case says:

"In his carefully considered opinion Judge Dooling (The District Court trial judge) (recognized) 'that plaintiffs had the unquestionable right to live together in student groupings, free from unwarranted public intrusions, just as traditional families had the right to live in areas restricted to one-family dwellings, he summarized the issue before the Court as follows:

> 'The question ultimately posed is whether it is lawful to have a one-family dwelling zone district which excludes equally small household groups who impose no greater burdens on use of the land than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children.'

"Judge Dooling concluded that the exclusionaire classification could not be upheld on traditional grounds supporting zoning regulations as a valid exercise of state police power . . ."

Amicus calls these to the Court's attention because both the District Court and the Circuit Court recognized that the fact situation did not fit into the categories with which the courts had previously dealt.

What we have involved in this case is a question of whether and upon what terms consenting and agreeing adults have the power to select and determine their own lives in the most personal of all matters: The selection of the persons and the determination of the terms of the personal relationships in the day to day necessities of living, i.e., the household and the nature of the household in which one lives.

The agreement, or contract, between the individuals involved is not connected with commerce. The contract does

not place additional burdens on the land, the contract creates one household and constitutes one tenancy of the premises and is thus consistent with the zoning prescribed—a single family dwelling unit. In no way does the contract operate to exploit or take an unfair advantage of others. It is a contract between the parties because they have determined this of their own choosing and mutual advantages. All of these facts are conclusions which both the trial court and the Circuit Court recognized.

That necessity and choice may cause people to establish a common household has been recognized by the Court as a recent decision in the *U.S. Dept. of Agriculture v. Moreno, supra.*

Any state or municipality, as a part of its criminal code, that sought to make the fact that more than two unrelated persons living together constituted a crime would be hard pressed to find a legal rationale of any kind satisfactory to any Court. Such an enactment would be considered so restrictive, and such a direct contradiction of common human experiences, that it would be struck down immediately. Obviously, if such an enactment could be sustained, then the law could forbid all persons not being a part of a husband-wife-child relationship to establish a common household. What kind of authoritarian society would exist if the governmental interest could be extended so far as to say that one must live with one's parents or live in absolute isolation.

This is the nature of the contract we are dealing with in this litigation. We live in households in common with other persons of our choosing, be they wives, husbands, children, brothers, sisters, cousins and close friends with whom we find compatability. This is a vital part of living

as a socially responsible person, as a free person. To deny to individuals the power to make this determination each for oneself becomes oppressive regimentation.

Men have lived together as "families" seemingly from time immemorable. But what is the legal definition of the family as found by the Courts? The "Family" is considered vital to our society, but legally how has it been defined? Curiously there seems to be little or nothing in recent cases on this subject.

One comparatively recent case arises in Minnesota. See *Tomlyanovich v. Tomlyanovich,* 239 Minn. 250, 58 N.W. 2d 855. In this case the Minnesota Supreme Court searched back into old cases and old authorities. On page 863 (58 N.W.2d) the Minnesota Court cites with approval and quotes the definition of family in 35 C.J.S. 738 as follows:

> "In its primary sense the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof, and has been most frequently defined as meaning, substantially a collection, or the collective body, of persons living in one house, or under one head or manager, . . . More specifically, the word has been defined as a collective body of persons, consisting of parents or children or other relatives, domestics, or servants, residing together in one house or upon the same premises; a collective body of persons who form one household, under one head and one domestic government, and who have reciprocal natural or moral duties to support and care for each other; * * *"

Further on, the Court cites with approval *Robbins v. Bangor Ry. & Electric Co.,* 100 Me. 496, 505, 62A. 136, 140, 1 L.R.A., N.S., 963, where the court said,

> "* * * the word 'family' is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. Dodge v. Boston & Prov. R.R. (Corp.) 154 Mass. 299, 28 N.E. 243, 13 A.L.R. 318. In that sense it has frequently been defined as synonymous with household."

If we turn to Black's Law Dictionary, we find just a general brief statement defining family as a collective body of persons who live in one house or within the same curtilage and under one head or management. Black's Law Dictionary under "family relation" states "a relationship which may exist between one taken into the family by the head of the family, notwithstanding the absence of blood relationship or of legal adoption." *Nelson v. Poormans Estate,* (Mo. App. 215 S.W. 753, 754) "Under 'family use' the definition is 'that use ordinarily made by and suitable for the members of a household, whether as individuals or collectively. *Spring Valley Water Works v. San Francisco,* 52 Cal. 120" also it lists "family expense" and defines it as an "obligation incurred for something intended for the use or comfort of the collection spoken of as a family as distinguished from individual or personal expenses. *Vace v. Wyatt,* 141 Iowa 506 . . ."

The most recent cases dealing with the question of "family" arise under what is known as the "family car doctrine". Under this concept an insured car of a member of household is insured so long as it is operated by a member of that household. These cases are numerous, one of the earlier ones is *Smart v. Bissonette,* 106 Conn. 447, 138 A. 365. See also *Lumberman's Mutual Casualty Co. v.*

Pulsifer, D.C. Me. 41 F.Supp. 249 which is dealt with more fully later.

The word "family" has a number of uses and definitions in our vocabulary. It is used as a classification of groups such as the "cat family", the "dog family" or the "human family". Obviously its usage in statutes and ordinances make this an absurd interpretation. A second usage is as a descriptive word of lineage—thus, we speak of a person's family in the sense of his ancestors and descendants. This is, of course, the interpretation that is used in the construction of wills and the laws of inheritance, but this is hardly apropo as a definition of family under zoning or similar ordinances. A Court has made an interesting distinction in this matter under the family car doctrine. That case is *Lumberman's Mutual Casualty Co. v. Pulsifer*, D.C. Me., *supra*, "A married son of insured", who had left parental home some years before, but who thereafter, together with his wife, and child, temporarily resided with insured while attempting to find a residence to rent, was not a "member of the household" of insured, within "drive other private passenger automobiles in liability policy excluding from coverage other automobiles owned by members of insured's household, and hence insured was covered by policy at time of an accident while driving his son's automobile on an errand. Ordinarily, the word 'household' is synonymous with 'family'. A 'family' is defined as the body of persons who live in one house and under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders. A 'household' is defined as those who dwell under the same roof and compose a 'family' a domestic establishment; family."

Obviously, the Court recognized that even though there

was lineage relationship, yet as an insurable risk, the son's automobile was not a part of the excluded risk not assumed by the insured. The case makes good law.

We come then to the third meaning of "family". The word "family" as used in zoning ordinances must be given the meaning that it is a collective body of persons who share a common household, all of whom have full curtilage rights in the premises, and who maintain such premises as their permanent place of abode and who have a relationship with each other, either by blood or contract. The question of curtilage, which is an old tenancy concept, enters into this picture and establishes a good test as to who is a member of the household. Every member of the household has full curtilage rights. A person who is a guest is invited into the place of abode and the use of the premises with defined limits as to where he may go and what he may do. A lodger has a sleeping quarters and has limited curtilage rights to use of toilet facilities, the use of hallways and at most the use of a common sitting room. A boarder has these rights and, in addition, would have rights to be present at the dining table and would probably have a greater freedom in the place of abode. But he certainly would not be authorized to use the private facilities of the owner or head of the household whereas a person who is a member of the household would have full rights to be in any part of the place of abode, including lands adjoining, buildings or facilities, basements, pantry, kitchen, without the head of the household or any member of the household feeling that the person had no right to be there. Thus we have a contract involved here of a nature that should be most favored by the law, a personal contract, one which goes to the core of the concept of liberty.

A contract that is not commerce, a contract that by its very nature requires the continuing consent of all parties, a contract which should be favored by government interest because it facilitates the very purpose of government which is the individual pursuit of happiness by its citizens.

THE IMPAIRMENT OF CONTRACT ISSUE

One must first recognize that the effect of this statute is to limit the right to contract to such an extent as to be in effect a total denial of that right. While three or more "blood relatives" could so contract, three or more close friends could not so contract under the ordinance. Thus, we have what amounts to a prohibition on contract, not legislation, which limits by defining one or more of the terms that are a part of the contract. For this reason it appears that the rationale of *Coppage v. Kansas, supra,* and *Adkins v. Children's Hospital,* 261 U.S. 252 may have more application than the cases such as *West Hotel v. Parrish, supra,* and *Holden v. Hardy, supra,* which dealt with limitations upon the terms of the contract. There is no question in Amicus Counsel's mind but that an ordinance, or a statute, which forbid more than two persons acting in concert, from making an employment contract would be declared invalid today and the courts would look to the old so-called anti-labor cases for exactly such authority. While the Court, in deciding *Coppage v. Kansas, supra,* and *Adkins v. Children's Hospital, supra,* failed to recognize the distinction between a prohibition on the right to contract and the defining of the terms of the contract upon the basis of socially responsible action; yet the decisions do give us food for thought in dealing with the effect of the ordinance involved in this case.

This was clearly recognized by Judge Mansfield in his concurring opinion on the denial of the *en banc* hearing. On page 828 (476 F.2d) he says:

> ". . . Here we are not concerned with commercial legislation but with a local ordinance directed squarely against the personal right of individuals to associate and live together and found by the district court to be 'impossible to justify' in terms of 'such familiar zoning objectives as safety, adequate light and air, preservation of lands from overintensive use, avoiding crowding of the population, reduction of traffic congestions and facilitation of adequate transportation, water, sewage, schools, parks and other public services'."

What concerns Amicus in this case is that the ordinance such as the one involved here have the effect of denying to people the right to live with those one chooses by an indirect attack upon the right to contract. Amicus recognizes that by a properly drawn ordinance which is not a prohibition but a definition of some terms of the household agreement may be proper. Indeed the law does just that in many respects such as that involved in the "family car doctrine" such as that involved in the concept of "family expense" and the responsibility therefore. Amicus conceeds that a properly worded zoning ordinance which required a certain area, or certain bedroom space, or even specified a certain number of persons within a dwelling of a specified size might be a proper use of zoning ordinance, but such terms must be of universal application to all citizens not just certain citizens. Amicus also recognizes that a zoning ordinance which established a single-family dwelling could, in a properly drawn ordinance, prohibit a landlord from creating more than one tenancy

in such an area, i.e. prohibit the individual leasing to two, three, four, five or any multiple number of individuals whereby there existed separate tenancy between the landlord and each tenant, because then there is not a "single family" but several households. In such a situation, there is obviously not the same right to contract issue. But that is entirely different from the issue here where the ordinance specifically says "a number of persons but not exceeding two (2) . . . as a single housekeeping unit . . . shall be deemed to constitute a family."

As we have seen, the concept of family has been given a meaning of long standing in the law, and under concepts of zoning it must be defined in terms of household; we have also seen that this involves one of the most personal rights of every citizen and is a contractual relationship; thus, an ordinance such as this must be *necessary* to the achievement of a *compelling* government interest. See Footnote 7, p. 447 in *Eisenstadt v. Baird*, 405 U.S. 438:

> "Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely *rationally* related to a public purpose but *necessary* to the achievement of a *compelling* state interest . . ."

But as we have seen both the district court and the Circuit Court of Appeals have determined that the ordinance provision is not even *rationally* related to a public purpose.

Thus, there is no question but what this court should hold that the plaintiff-appellee's right to contract was impaired by the ordinance, that the ordinance does not con-

stitute a reasonable definition of a term of the contract because of any compelling need for governmental intervention, and that, in fact, it has not even been shown that the ordinance is *ra·tionally* related to a public purpose, but it has been established that it is contrary to a governmental interest because the governmental interest is to favor such contracts as a means of prompting the pursuit of happiness for its citizens.

THE DISCRIMINATORY CLASSIFICATION ISSUE

It is Amicus' position that the ordinance as drawn and as threatened to be applied is discriminatory between citizens in their right to contract in that it establishes a different basis of contract between persons. It is an attempt to create, indirectly as a land-use concept, what is in fact a discriminatory classification between citizens in their right of contract.

The claim by appellants is that the ordinance is to protect the current concept of the "family"; but by its own terms it makes an exception in that it allows *two* unrelated persons to live in a single dwelling unit; but there is no attempt to limit all occupancy to two persons because admittedly persons related by blood in any number can occupy a single dwelling unit. Thus, it cannot logically be argued that the purpose of the zoning ordinance was to limit the number of occupants in a single dwelling unit. Conversely, since the ordinance permits two unrelated persons to live in a single unit it cannot be argued that the ordinance restricts occupancy to husband-wife with or without child or children.

Thus, by the use of zoning laws the Village is seeking to make a distinction between a "marriage contract" which

is a contract to live together, and other types of contracts made by people to associate themselves together. This invades the basic constitutional right of contract and is discriminatory against persons who are not married, thus encountering difficulty with the "equal protection" clause; or conversely, by making a definition of *two* unrelated persons the Village is attempting to make a distinction between a group of persons which is two in number and a group of persons that is three, four, five, or six (or any other number) in number. This invades the basic constitutional rights of contract and is discriminatory as between the number of individuals who wish to contract together. Such discrimination encounters difficulties with the "equal protection" clause. There is a third classification embodied in the ordinance which is the "blood" relationship as contrasted to the term "unrelated". The phrase is "one or more persons related by blood" and the other phrase is a "number of persons but not exceeding two . . . though not related by blood, adoption or marriage, shall be deemed to constitute a family." It would appear clear from this language that any number of brothers and sisters could contract between themselves to live as a household unit and comply with the ordinance. Thus, again the ordinance is not directed to the number of occupants per area, or any other land use concept. The distinction is wholly without any land use basis and is rather directed at an interference with the right of people to establish a common household between themselves (which is of necessity a contractual arrangement) by a classification process which violates the equal protection clause. If a dozen brothers and sisters can constitute a "family" within the ordinance, would this also not then

be true of cousins? second cousins? Cousins to the ninth or tenth degree? Clearly, such persons have a "blood" relationship. If such discriminatory classification is approved, does this not compel the sanctioning of ethnic classification because of the concept of "blood" relationship? No matter how one reads the plain wording of the statute one encounters an attempt to use the zoning ordinance, a land use concept of governmental power, in a discriminatory manner which interfers with a basic constitutional Right of Contract. This is clearly violative of the "equal protection" clause.

To make a distinction between married and unmarried persons did not save a statute from being unconstitutional in *Eisenstadt v. Baird,* 405 U.S. 438. Clearly, under the purposes of the zoning law it is not the marital status of the people involved, but the socially responsible use of land. The zoning law does not deal with "domestic relations", the relationship of one person to another. Its purpose is to deal with the land use. Assuming arguendo that one male and one female each with two adult children were to agree to live together in the Village of Belle Terre under the ordinance in question. We then have six adults living in a single family dwelling. Does it make any difference to a land use ordinance whether any two of these persons have a marriage contract or not? Yet that is exactly the distinction which the ordinance seeks to impose, a distinction which is wholly unrelated to any use of the land. Such contracts between people, regardless of sex, age or background to live together cannot, ipso facto, be considered as suspect or illegal. Rather this involves one of the most personal decisions that every individual has to make for himself or herself. Of all the contracts that an

individual makes with other persons in the course of living, this is one of the most personal and most private. This is an area of great sensitivity to every person. For the law to attempt to define and deny some such contract and approve others is to put the law into the decision of private mores and morals, not on the basis of conduct affecting a governmental interest; the effect could be to align the law with one set of mores and opposed to another. This can become a "governmental interest" only in an authoritarian, one-religiously oriented, government. In this sense, it is a religiously sensitive area, and any claimed right of the exercise of governmental power to discriminate should be suspect.

The law recognizes many commercial contracts, such as contracts for labor, contracts for services, contracts for the sale of one's products, contracts for the purchase of goods, contracts for transportation. In recognizing such contracts the law precludes governmental discrimination which would attempt to say that some persons can enter into such contracts and other persons cannot, without a clear showing that the contract has a direct governmental interest which subjects the contract to regulation.

See: *Allgeyer v. Louisiana, supra, West Coast Hotel v. Parrish, supra, Hardware Dealers Mutual Fire Insurance Co. v. Glidden, supra.*

These generally take the form of business regulations, a specific governmental power granted to both the Federal and State Governments by specific constitutional authorization. There is certainly no specific constitutional authorization to regulate "households" or family grouping, where we have a contract which is strictly a personal agreement about very personal matters. Of all the contracts

which the law recognizes and enforces, the one which deals with the household in which one lives should have a most favored category. Since household contracts are so personal, the area of governmental interest must be very restricted. The agreement to set up a common household should certainly be recognized by the law equally with contracts in other areas of human business and personal dealings, and afforded no greater limitations on their content than commercial contracts, requiring a scrutiny of any law which infringes upon them.

Amicus recognizes that the rental of property is a business and is subject to governmental regulation. Thus, a properly worded and drawn ordinance dealing with the rental of property could set some limitation upon the number of tenancies a landlord could establish based upon the size of a building, or that a certain amount of area had to be provided for each occupant. Similarly the operation of a boarding house, or a lodging house, or a hotel can be regulated. But such regulation should not be construed into a zoning regulation, nor a zoning regulation use as an indirect manner to regulate a business. It is Amicus position that the use of the property here by the Appellees are the same under a zoning ordinance whether the Appellees had purchased the property, owning the fee interest, or whether they had a leasehold tenancy and that what is at issue is a land use. Thus, while a landlord-tenant relationship may involve a business on the part of the landlord and be subject to regulation as such, yet clearly here the ordinance is directed at the Appellees as users of land and not the landlord as a person subject to a regulated business.

Thus, it clearly appears that the ordinance, in creating

a distinction as to two (2) "unrelated" persons is discriminatory classification on its face and in its application to plaintiff-appellee herein, that such discriminatory classification can and will have far-reaching effects in its impairment of the right of contract; is not necessary by reason of any compelling government interest; and is not rationally related to any public interest, but is in fact contrary to a governmental interest in providing for the pursuit of happiness for its citizens.

THE RIGHT OF ASSOCIATION

Amicus also urges upon the Court to recognize that there is a basic Right of Association, a basic right to choose those persons in the society in which we live with whom one associates as friends and partners.

This was recognized in the decision of the Second Circuit in deciding this case, as a sort of additional justification for its decision. See 476 F.2d, p. 817. In a sense this is a right of each person to be discriminatory and it is therefore a limited right. A person cannot open his doors to the public for business and then on this basis discriminate on the basis of certain classifications as to the persons with whom he will do business. Here again we come to the distinction between a governmental regulation of business and a question of personal relationship. The law can say clearly that one cannot refuse to do business with another person because of his origin or social background if one has extended an invitation to the general public to do business with him; but the law cannot say that because one asks a certain "friend" for dinner that therefore, he has to ask all who would like such an invitation. We each have other persons whom

we find compatible and attractive to us, with whom we find stimulation and satisfaction, whose companionship is such that we can share those personal parts of ourselves that we do not show to the general public. This is a basic human necessity which every person has, and one which should be clearly recognized in the law. Where the Right of Association ends and illegal discrimination against persons because of certain circumstances begins is obviously a grey area and incapable of easy definitions. But this is not new or novel in the law: At what point does the merger of business enterprises become illegal restraint on trade? Clearly the merger of business enterprises is not illegal and is assumed to be within the power of the business enterprises, e.g., Minnesota Business Corporation Act, *Minnesota Statutes*, section 301.41, which so provides. Equally clear if the merger results in total monopoly with ability to completely control the prices in a given industry or market it is an illegal act. At some point between the authorization of business enterprises to merge and total price control, the act of merger has become illegal. Similarly, the Right of Association is clear as to an invitation to a friend to dine at one's home and the use of the Right of Association to say one will not do business with another because of his racial background. In one situation we have clearly lawful conduct and in the other clearly unlawful conduct; yet one is but the extension of the other. The extremes are easy to perceive, but the demarcation line is sometimes difficult. Thus, a seeming definition in one case can cause problems in another. It is the grey area which becomes difficult to define.

However, in the case under consideration, we do not have a grey area. Here we have a group of persons who clearly desire the association of each other in the most

personal of all relationships, that of the household unit in which they live. The selection of such associates is a highly personal matter. This is an area which any governmental invasion must be carefully scrutinized. For a governmental structure to say that one must or cannot be a part of the same household with another whether for personal economic reasons (*Marino* case) for religious doctrinaire reasons (Hutterites. Amish and others) for political compatibility, or just plam social agreeability is the type of action which will meet with almost universal opposition. Perhaps the only other attempt at the exercise of government police power which would meet with more universal opposition would be a law determining that one person must reproduce with a certain other person or which person may not reproduce with certain other persons. (This latter has been tried in the miscegenation statutes which have been struck down by the courts and would be clearly held invalid today.) Thus on the facts of this case as the exercise of the Right of Association, we do not have a grey area, but a clear unequivocal invasion of the Right of Association without difficulty of any definition.

Thus, by invading a clear Right of Association and by a discriminatory classification against the Right of Association, the ordinance becomes totally unconstitutional. The arguments and position outlined in pages 24 to 27 of this brief dealing with the impairment of contract are so close that for the sake of brevity, Amicus will include them be reference only herein; similarly the arguments and position outlined in pages 27 to 32 of this brief dealing with the discriminatory issue are so close that Amicus will include them by reference only herein. (This is to save Amicus expense and the Court time, but it is not done

on the basis that the issue is subordinate or unimportant.) Amicus' position is that both the Right of Association and the Right of Contract are independent and substantial individual rights, needing a clarification by the Court.

It is in such a case as this one that the Court has an opportunity to define the Constitutional rights of citizens and thus given societal guidance as to what is permissible governmental action and what is impermissible governmental action and a violation of such basic human rights as are protected by the Ninth Amendment to the Constitution of the United States.

A GOVERNING AUTHORITY

It appears that appellants have argued that the Village of Belle Terre is a small community that has a desire to preserve some concept of homogeneity. If Belle Terre were only a "community" and did not exercise "police power" (to-wit: have the ability to impose fines and incarceration) then perhaps the argument would have some validity, i.e., that if Belle Terre is a community of people with certain beliefs, religious, political or social, and only those sharing the mores of that community were welcome to share the community without governmental power, the argument would have some validity, but Amicus counsel knows of no such concept in our law today. But the Village of Belle Terre claims to be a Municipal corporation, authorized by the State of New York to exercise governmental power, and as a part of the whole "governing structure" in our society. It, therefore, is a governmental body, and rules applicable to its authority are universally applicable to all "governing authority". Thus, the deci-

sion of the Court in this case is going to set out a rule for all governing authorities, unless the Court were to undertake legislative functions and determine that some municipal corporations can adopt such ordinance as that involved in this case and others cannot. The concept of the universality of law is applicable. If the Village of Belle Terre can adopt such an ordinance impairing the Right of Contract and the Right of Association, then any and all governmental authorities have this same power.

Thus, it is imperative that the Court find the ordinance involved invalid and beyond the governmental power, affirming the decision of the Second Circuit Court of Appeals upon the basis presented by plaintiff-appellees or upon one or both of the bases presented by Amicus in this brief.

CONCLUSION

That Article I, §D-1.35a of the Building Zone Ordinance of the Village of Belle Terre (June 8, 1970) is invalid and the decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

CHESTER A. BRUVOLD, ESQ.
410 WCCO Building
Minneapolis, Minnesota 55402
Attorney for Amicus